SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

No. 73-1244

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

JESSIE SHORT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion and judgment of the Court of Claims (App. A)[1] is reported at 486 F. 2d 561.

JURISDICTION

The judgment of the Court of Claims was entered on October 17, 1973. On January 10, 1974, Mr. Chief Justice Burger extended the time within which the

[1] "App." refers to the separately bound appendix filed with the petition for a writ of certiorari (No. 73-1104) filed by the Hoopa Valley Tribe, intervenor below.

United States may petition for a writ of certiorari to and including February 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether, in light of the discretion given the President by Congress to settle Indians on reservations in California, and in light of specific actions by Congress treating separately different parts of the Hoopa Valley Reservation, the Court of Claims erred in setting aside the determination by the Secretary of the Interior that the Hoopa Valley Tribe has tribal jurisdiction over the portion of the Reservation that is its ancestral home and historic reservation and which continues to be the place where most of the enrolled members of the tribe reside.

2. Whether the Secretary of the Interior acted properly in paying the proceeds of annual sales of timber on the original Hoopa Valley Tribe portion of the Hoopa Valley Reservation to members of the Hoopa Valley Tribe, to the exclusion of the respondents, members of the Yurok Tribe.

STATUTES AND EXECUTIVE ORDERS INVOLVED

The statutes and executive orders primarily involved are Act of April 8, 1864, 13 Stat. 39 (App. B); Act of June 17, 1892, 27 Stat. 52 (App. C); Executive Order of June 23, 1876, 1 Kappler 815 (App. D); Executive Order of October 16, 1891, 1 Kappler 815 (App. E).

STATEMENT

1. This is a suit by 3,323 individual Yurok Indians against the United States, claiming that the United States improperly paid to the members of Hoopa Valley Tribe, to the exclusion of the respondents, money gained from the sale of timber on the original Hoopa Valley Tribe portion of the Hoopa Valley Reservation. At stake are an estimated 16 million dollars in past payments and the future control of the tribally owned land in the Reservation.

This case grows out of the same history considered by the Court in *Mattz* v. *Arnett*, 412 U.S. 481, and reference to that decision and the map reprinted by the Court following 412 U.S. 506 will be helpful in considering this petition.

By order of November 16, 1855, President Pierce, under congressional authorization, established the Klamath River Reservation for the Yurok Indians. See *Mattz, supra,* 412 U.S. at 487. See, also, App. A 14–16. The reservation encompassed the land marked as "Old Klamath River Reservation" on the Court's map (412 U.S. at 506). The area was historically occupied by the Yuroks.

The original Hoopa Valley Reservation, the Square, as shown on the Court's map, was established in 1864. The boundaries were confirmed by Executive Order on June 23, 1876. *Mattz, supra*, 412 U.S. at 490, n. 9; App. A 25–27. At that time the population of the Square was overwhelmingly Hoopa (App. A 29). The area was the historic home of the Hoopas. Subsequently

all Indians living on the Square have been considered Hoopa for purposes of census (App. A 31–32) and, increasingly for purposes of tribal government (App. A 90–92).[2]

2. The two reservations were entirely separate until 1891 when, to comply with the Act of April 8, 1864, 13 Stat. 39 (App. B1–13), which limited the maximum number of reservations in the State to four, the President joined the two by a connecting strip and designated the whole as the Hoopa Valley Indian Reservation (see *Mattz, supra,* 412 U.S. at 492–494; see, also, map, 412 U.S. at 506). Nothing in the Act of 1864 required that the tribes within the reservation jointly occupy or govern all the land within the reservation, and there is no evidence that the President in the years immediately after the joinder of the two reservations attempted to disturb the separate lives and tribal identities of the two areas. Even many years later, the Yurok and Hoopa areas were considered too inaccessible to one another for mutual government (App. A 78–79). Moreover, the two groups were of different Indian families and did not share a common language (see App. A 13; see also Kroeber, *Handbook of the Indians of California,* 121–122, 128–130 (1925). Indeed, from the time the Reservation was expanded in 1891, a pattern of administrative and legislative action emerged recognizing in the residents of the Klamath River Reservation, the connecting strip, and the

[2] It is possible that there are a few long-term Indian residents of the Square excluded from the Hoopa roll. It is the position of the United States that such persons and their descendants are entitled to participate in the assets of the Square.

Square separate rights in their respective areas of the Reservation.

By the Act of June 17, 1892, 27 Stat. 52, only a year after the Reservations were joined, Congress granted allotments on the Klamath River portion of the Reservation to Indians who resided on that portion and provided for sale of the remaining land of that portion to non-Indian settlers. The proceeds of the sale were to be used exclusively "for the maintenance and education *of the Indians now residing on said lands and their children.*" 27 Stat. 52, 53 (emphasis added). Under this Act, 161 allotments were made to the resident Indians, averaging 60 acres. Of these Indians, only two were known to be Hoopas, and they had resided for many years on the Klamath River Reservation (App. A 56).

In 1898 the connecting strip was similarly allotted to the Indians living there. 499 allotments were made, averaging 40 acres, including both timber and agricultural lands. Of the Indians receiving allotments, again only two were known to be Hoopas, and they were long-time residents of the connecting strip (App. A 58).[3]

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[3] We are informed by the Bureau of Indian Affairs that of the approximately 30,000 acres allotted in these areas, some 11,609.75 acres were subsequently sold by supervised or negotiated sale (in which the Bureau of Indian Affairs acted for the individual Indian owners) for a total of $3,836,783.69. In addition to the acreage sold by supervised or negotiated sale, Bureau records also show that some 15,769.39 acres were "fee patented" to the Indian owners. While the Bureau records do not indicate what disposition was made of the lands after the fee patents were issued, the Bureau records and other records (see S. Rep. No. 278, 60th Cong., 1st Sess. 18 (1908)) indicate that this

It was not until 1922 and 1923 that allotments were made available to the residents of the Square. Then 365 allotments were made, averaging only eight acres each, because the timber lands were not allotted (App. A 60–61). These timber lands remained in tribal ownership and the revenues produced by them are the asset that the Yuroks seek to share.

3. The tribal government of the Hoopa portion of the Reservation is of long standing. While little is developed in the record of the historical Indian government, it is clear that in 1915 a council for the Square was called together to handle allotments on it (App. A 77). This council was composed exclusively of residents of the Square, including a Yurok Indian. Its restricted composition, as well as its recommendations to deny allotment rights on the Square to residents of the Addition, were specifically approved by the Indian Bureau (App. A 69–70). In the 1930's, when tribal governments throughout the country were reorganized, Commissioner of Indian Affairs Collier approved the Constitution and bylaws of the Hoopa Business Council as the government of the Square (App. A 82–83), retaining the divided status of the Reservation, even though the council sometimes dealt with affairs of the Addition as well (App. A 83–84).

The Constitution of the Hoopa Valley Tribe has

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land was heavily timbered and thus, presumably, also yielded substantial income to the Indian owners. Finally, the Bureau records show that the Yurok allottees derived miscellaneous income (such as permit, right-of-way and timber trespass fees) from their part of the Reservation in the amount of $583,529.74.

subsequently been amended from time to time to broaden its base effectively to include not only Hoopas but other Indian inhabitants of the Square and their descendants, including a few Yuroks (see App. A 89–92). An official roll of the Tribe has been compiled. The Secretary has used this roll for the distribution of income produced in the Hoopa Tribe's area of the Reservation (App. A 96–97, App. G; see note 2, *supra*).

There is no recognized tribal government for the Yurok Indians, and most of them, in contrast to the Hoopas, live totally outside the Reservation. Income produced in the connecting strip and the former Klamath River portion of the Reservation has been used for the benefit of the residents of those areas to the exclusion of the Hoopa Valley Tribe (App. A 95–96).

4. In the mid-1950's, commercial development of the unallotted timber on the Square began to generate substantial income, which was paid to the members of the Hoopa Valley Tribe. A number of Yurok Indians, who resided, and whose ancestors resided, outside the Square, sought to share in this money, but in 1958 the Secretary of the Interior ruled that the unallotted resources of the Square belonged exclusively to the members of the Hoopa Valley Tribe. 65 I.D. 59 (App. G).

A large group of Yurok Indians subsequently brought this suit in the Court of Claims. The Hoopa Tribe's motion to intervene was denied by the trial judge, but the Tribe was allowed to participate as

amicus curiae. On May 22, 1972, the trial judge ruled that the 1891 Executive Order created a single indivisible reservation giving the descendants of each Hoopa and each Yurok Indian identical rights in the entire reservation, and as a result held that 22 of 26 "sample" plaintiffs were entitled to judgments against the United States in amounts to be later determined. The Court of Claims adopted the trial judge's recommended decision *per curiam*. The court also granted the motion of the Hoopa Valley Tribe to intervene.

On January 14, 1974, the Hoopa Valley Tribe petitioned this Court for a writ of certiorari (No. 73–1104) to review the judgment of the Court of Claims.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims that the Yurok claimants are entitled to share in the proceeds of the sales of timber in the Square erroneously upsets established tribal rights and relations. It is apparently based upon the mistaken premise that where the President is authorized to settle more than one tribe on a reservation, particular areas cannot be reserved for each tribe. This holding is not supported by law.

The Act of April 8, 1864 (App. B), which authorized the President to set aside four reservations in California for the benefit of all California Indians, imposed no artificial limitation on the authority of the President to locate more than one tribe on a

reservation,[4] nor did it require the President to merge tribes or destroy tribal governments or jurisdiction.[5] Having so severely limited the number of reservations permissible, it would have been unreasonable for Congress to have so restricted the President, and it did not do so.

Nothing in the Executive Order of October 16, 1891 (App. E), extending the Hoopa Valley Reservation (The Square) so as to preserve the Klamath River Reservation, shows any intent on the part of the President to merge the two tribes or give either rights outside its traditional area. In view of the physical, historical, and cultural separation of the tribes and the reason for the merger (see *Mattz, supra,* 412 U.S. at 492–494), there is no basis for finding such an intent to be implied.[6]

Any doubt about the remaining separateness of the areas after the joining of the two Reservations was, in our view, eliminated by the Act of Congress of

[4] Under the 1864 Act the President established 22 separate reserves for various bands of Mission Indians (collectively regarded as one reservation for the purpose of the 1864 Act), in which each band obtained exclusive substantive rights to its own reserve (see various Executive Orders collected in 1 Kappler 819–824).

[5] Indeed, the Acts of May 17, 1882 (22 Stat. 68, 88) and July 4, 1884 (23 Stat. 76, 97), which are codified at 25 U.S.C. 63, expressly forbid the consolidation of tribes residing on Executive Order reservations without obtaining the consent of the tribes to be affected thereby.

[6] Indeed, in 1890, the Department of the Interior opposed a bill, which had passed the House of Representatives, which would have provided that the Yurok Indians of the Klamath River Reservation be removed to the Hoopa Valley Reservation and there receive allotments (App. A 45).

June 17, 1892 (App. C). That Act, after the joinder of the Reservations, treated the residents of the former Klamath River Reservation (the Yuroks) separately and provided valuable allotments for them to the exclusion of the residents of the rest of the expanded Reservation. This, and the subsequent exclusive allotment of the Connecting Strip (*infra*, p. 5: see Map, 412 U.S. at 506) fully justified the Secretary's determination that the assets of the Square, largely inhabited by Hoopas, should likewise be distributed among the inhabitants of that area. The presence of some conflicting statements as to the rights of the various groups where other matters were at stake, and at other times, does not nullify the correctness of the Secretary's decision, nor his authority to make it.

In rejecting the claims of the Hoopa Valley Tribe, the decision below emphasized that the Reservation was intended for such tribes as the President might put there and that no tribe had a vested interest in it (App. A 8–9). But, for the very same reason, no tribe's rights were abrogated by the reasonable action of the Secretary in reserving the assets of the separate areas of the Reservation for the separate tribes—especially in light of the fact that Congress had acted in the same way.

2. The decision of the Court of Claims unduly interferes with the authority of the political branches of the government to recognize tribal membership and tribal jurisdiction.

a. The recognition of Indian tribes is a matter for Congress or, in the absence of congressional action,

for executive officers. As this Court stated in *United States* v. *Holliday*, 3 Wall. 407, 419:

> The facts in the case * * * show distinctly "that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty, that the tribal organization should be preserved." In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. * * *

In *Baker* v. *Carr*, 369 U.S. 186, 215, the Court reaffirmed *Holliday* and reiterated in some detail the principle that the recognition of Indian tribes is a matter left essentially to the Executive and Congress. The basis of this principle as to Indian tribes was described in Mr. Justice Frankfurter's dissenting opinion in *Baker* as follows (369 U.S. at 282):

> A controlling factor in such cases is that, decision respecting these kinds of complex matters of policy being traditionally committed not to courts but to the political agencies of government for determination by criteria of political expediency, there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged. * * *

The wisdom of this principle in the context of Indian tribes is illustrated by the facts of the present case. It was a question of judgment for Congress and the Executive as to how allotments should be made

to the several tribes within the expanded Hoopa Valley Reservation. And it is similarly a question of judgment for the political branches to decide how tribal governments should be established (and, in a case such as this, over what part of a Reservation they should have jurisdiction), in order to form functioning political entities capable of real service to their peoples.

In making such judgments, Congress and the Secretary must consider governmental and cultural, as well as financial, realities. Normally an Indian tribe is a distinct political community with territorial boundaries. Each tribe is a " 'people distinct from others.' " *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 169. As the Court noted in *McClanahan* (*id.* at 179), sovereignty of any kind is tied to control of territory. It is thus reasonable that when several tribes are to occupy a single reservation, some kind of division should be established. The borders may not be mathematically perfect in terms of nationality, but the necessity for practical solutions requires that the political branches have adequate discretion in solving such problems.

b. Here the decision of the Secretary was just. The Yuroks had received large and valuable allotments. It is only because the residents of the Square received allotments of approximately eight acres each rather than 40 or 60 acres, and kept the rest in tribal ownership, that the fund which is the subject of this lawsuit exists. It would be inequitable to take from the Hoopas their common property, which they sacrificed the pos-

sibility of large allotments to preserve, and grant an interest in it to others who received larger allotments from which the residents of the Square were precluded.

Furthermore, if, as the decision below requires, the Hoopa Valley Tribe must now share its tribal assets with the Yuroks, it would also have to share all decisions on the management of the tribally held property. Since in that respect the Hoopas would be hopelessly outnumbered,[7] under the decision below their carefully nurtured ancestral homeland would be turned over to the effective control of outsiders.

CONCLUSION

The fact that this case is crucially important to one Indian Tribe and a large part of the membership of another and concerns their relationship with the United States is reason for this Court to grant certiorari. As stated in *Choctaw Nation* v. *United States,* 318 U.S. 423, 424, certiorari is appropriate if a case raises "important questions concerning the relations between the two tribes and the United States." Moreover, the decision below unduly limits the authority of the Secretary of the Interior to make needed decisions in the area of Indian affairs, and, in our view, reaches an unjust result.

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[7] There are 1,360 names on the Hoopa Valley tribal roll, compared with 3,323 plaintiff Yuroks.

For the foregoing reasons, the petition of the United States for a writ of certiorari should be granted.

Respectfully submitted.

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